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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection of	)	MD Docket No. 95-3
Regulatory Fees for	)	
Fiscal Year 1995	)	

COMMENTS OF LDDS COMMUNICATIONS, INC.

February 13, 1995

Catherine R. Sloan
Richard L. Fruchterman
Richard S. Whitt
LDDS Communications, Inc.
1825 Eye Street, N.W.
Suite 400
Washington, D.C. 20006
202/429-2035

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COMMENTS OF LDDS COMMUNICATIONS, INC.

LDDS Communications, Inc. ("LDDS") hereby files its comments in response to the Notice of Proposed Rulemaking ("Notice") released by the Commission in the above-captioned proceeding on January 12, 1995.[1] LDDS submits that, in order to prevent harm to certain segments of the interexchange marketplace and to adhere to the statutorily-circumscribed terms of its permissive authority, the Commission must make several important changes to its proposed revised Schedule of Regulatory Fees ("Schedule") for Fiscal Year 1995.[2]

I. INTRODUCTION AND SUMMARY

The Commission's Notice states that, in order to recover the amount of regulatory fees that Congress has required it to collect for Fiscal Year 1995 ("FY 1995"), the Schedule of Regulatory Fees for FY 1994 must be revised to recover

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[1] Notice of Proposed Rulemaking, MD Docket No. 95-3, FCC 95-14, released January 12, 1995.

[2] LDDS is the nation's fourth largest long distance carrier. LDDS acquired IDB Communications Group, Inc., an international carrier, and WilTel, Inc., with its nationwide fiber optic network, on December 30, 1994 and January 5, respectively.

$116,400,000 in costs.[3] The <u>Notice</u> reiterates the statutory requirement that the FCC's regulatory fees are intended to "recover the costs ... that it incurs in carrying out enforcement, policy and rulemaking, international activities, and user information services."[4] The statute also states that the fees must "be established at amounts that will result in collection, during the fiscal year, of an amount that can reasonably be expected to equal the amount appropriated for such fiscal year for the performance of the activities described in subsection 9(a)...."[5]

Although the statute requires the Commission to make mandatory adjustments to the Schedule of Regulatory Fees,[6] the FCC also is given the authority to make so-called "permitted amendments" to its Schedule. Adjustments to the Schedule are allowed to take into account "factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities...."[7] Any amendments adopted to "add, delete, or reclassify services in the Schedule" must "reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in

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[3] <u>Notice</u> at paras. 1-2.

[4] <u>Notice</u> at para. 4; <u>see</u> 47 U.S.C. § 159(a) (1994).

[5] 47 U.S.C. § 159(b)(1)(B).

[6] 47 U.S.C. § 159(b)(2).

[7] 47 U.S.C. § 159(b)(1)(A).

law."[8] No other types of amendments to the Schedule are authorized.

In its proposed revised Schedule, the Commission greatly expands the number of entities that must pay regulatory fees. In addition to the statutorily-derived list of facilities-based interexchange carriers ("IXCs"), local exchange carriers ("LECs"), and competitive access providers ("CAPs") which were required to pay fees in FY 1994, the Commission proposes to add to the list resellers, operator service providers ("OSPs"), and any other providers of WATS, 800, 900, telex, telegraph, video, or other switched access services.[9] In addition, the proposed revised regulatory fees for FY 1995 are "significantly higher" than the fees assessed for FY 1994,[10] in many cases by over 100 percent.

LDDS submits that the Commission's proposed fee structure adversely affects the interexchange reseller marketplace by imposing a double fee payment on resellers. This result violates long-standing Commission policy regarding unrestricted resale and is also contrary to Congressional expressions of concern regarding common carrier funding mechanisms.

LDDS further submits that the Commission has offered no rationale for several important changes it proposes to make to

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[8] 47 U.S.C. § 159(b)(3).

[9] Notice at paras. 56-57.

[10] Notice at para. 3.

its Schedule of Regulatory Fees. In particular, the Commission has not reasonably utilized its permissive authority to set its regulatory fees for certain categories, such as fixed earth stations. The revised regulatory fee structure also fails to apply to many telecommunications service and equipment categories which cause substantial regulatory costs to be incurred by the Commission. In addition, the Schedule fails to distinguish in any manner between those common carrier entities with market power which require significant regulation and oversight activities, and those entities which do not. Thus, the Commission must revise its proposed Schedule of Regulatory Fees for FY 1995 because of its adverse impact on interexchange resellers and because it is not adequately supported by the statutory cost factors specified by Congress.

LDDS also raises several issues that it believes require clarification, particularly regarding the fees associated with pay telephones and operator services. Finally, LDDS recommends that the Commission collect actual "demand" data from industry after it determines the fee structure it plans to use but before setting the actual fees. Having this data in hand will enable the Commission to set the fees at the appropriate level.

II. THE COMMISSION'S PROPOSED FEE STRUCTURE IMPOSES A PENALTY ON INTEREXCHANGE RESALE IN CONTRAVENTION OF COMMISSION AND CONGRESSIONAL POLICY

In the <u>FY 1994 Order</u>, the Commission, following the statutory directive from Congress, required interexchange carriers ("IXCs"), Local Exchange Carriers ("LECs") and Competitive Providers ("CAPs") to pay regulatory fees based on their number of presubscribed lines.[11] In the Notice, the Commission proposes to use its authority to make Permissive Amendments to expand the statutory schedule of fees to include, among others, resale common carriers.[12] The Commission justifies its decision to include resellers by stating that "resellers and other carriers providing interstate services subject to our jurisdiction and directly benefitting from our regulation of the interstate network should be subject to a regulatory fee payment."[13]

LDDS agrees with the Commission that all carriers subject to the Commission's regulation and benefitting from the Commission's regulation of the interstate network should bear a fitting portion of the Commission's regulatory fees.[14] LDDS believes, however, that resale common carriers did pay a proportionate share of the Commission's regulatory fees under the 1994 schedule of fees. Rather than simply adding resellers to

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[11] Notice of Proposed Rulemaking, MD Docket No. 94-19, FCC 94-46, released March 11, 1994, at para. 89 and Report and Order, MD Docket No. 94-19, FCC 94-140, at para. 97. The fee for IXCs and CAPs was $6.00 per 1000 access lines in 1994.

[12] Notice at para. 57.

[13] Notice at para. 56.

[14] Rather than the Commission's flat fee approach for all classes of carriers, LDDS believes that the fees should be structured to reflect the relative burdens that some classes of carriers place on the Commission's resources. This position is discussed in Section V below.

the pool of payers, either of the two proposed 1995 schedule of fees forces resellers to pay regulatory fees twice. If it remains unchanged, the proposed fee schedule will seriously harm what the Notice acknowledges is a "strong communications resale industry."[15]

To ensure that this resale industry is not excessively burdened by regulatory fees, the Commission should eliminate the double payment penalty for resale by applying its fees only to the interexchange retail services.

A. Effect of the Proposed Fee Schedule on the IXC Resale Market

1. Description of the IXC Resale Market

To understand the effect of the proposed fee schedule on the interexchange resale marketplace, a brief explanation of that marketplace is necessary. Most interexchange carriers operating in the market today own very little in the way of long distance facilities; instead, most carriers resell the services of other carriers. There are principally two forms of resellers: facilities resellers and "switchless" resellers. Both will be adversely impacted by the Commission's proposed fee structure.

Facilities resellers lease capacity in the form of DS0s, DS1s and DS3s from one or more facilities-based IXCs and use that capacity to connect interexchange switches, which they generally own. A facilities reseller will then sell either minutes or circuits to end-users (or to other carriers). This

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[15] Notice at 56.

type of reseller has its own carrier identification code ("CIC") that LECs use to associate presubscribed lines with interexchange carriers. The facilities reseller generally purchases its own local access from the LECs. Under the Commission's 1994 fee schedule, facilities resellers paid -- directly to the Commission -- $.06 per presubscribed line associated with its CIC (or CICs) just as any other IXC.[16]

A switchless reseller, rather than purchasing network capacity as described above, purchases minutes on one or more underlying carrier's network. The switchless reseller then sells those minutes to end users and later receives a billing tape from the underlying carrier to bill its end users. Generally, local access for switchless resellers is purchased by the underlying carrier and incorporated into the rates charged the reseller. Switchless resale, because it does not require a large investment in network facilities or in switching equipment, is the least costly and easiest method of entering the interexchange marketplace. For that reason, switchless resale has become one of the fastest growing market segments and contributes significantly to the intensity of the competition in the interexchange marketplace, particularly benefitting residential and small business consumers.

Most switchless resellers, for technical or economic reasons, do not possess their own CIC and so cannot have lines

[16] Until the acquisition of WilTel in January, 1995, LDDS operated largely as a facilities reseller. Nevertheless, LDDS made a sizable payment to the Commission for regulatory fees in 1994.

presubscribed directly to them.[17] Instead the lines (or Automatic Number Identification or ANIs) of a switchless reseller are presubscribed to the underlying carrier, using the underlying carrier's CIC. The ANIs of a switchless reseller's customers are recorded and reported by the LECs as presubscribed to the underlying carrier.

Under the Commission's 1994 fee schedule, underlying carriers paid $.06 per presubscribed line associated with its CIC (or CICs) even though a portion of those presubscribed lines were actually end users of switchless resellers. Does this mean that switchless resellers escaped payment of the 1994 regulatory fees? Not at all. Although it was the underlying carrier that paid the fees directly to the Commission, the switchless resellers paid the fee indirectly through the rates charged by the underlying carriers. Even though the wholesale carrier market is extremely competitive and prices are being driven down daily, direct costs such as regulatory fees must be accounted for by IXCs when setting wholesale rates.

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[17] There is currently a shortage of three-digit CICs, so many of the switchless resellers, most of which have entered the market in just the past several years, are unable to have CICs assigned to them. This situation may change when the new North American Numbering plan converts to the use of four-digit CICs. Even if they are able to have their own CIC, switchless resellers may be forced to pay substantial fees to LECs to have their CICs translated to the CIC of the underlying carrier, rendering this option uneconomic.

2. Effect of Alternative One on the Resale Market

The first method proposed by the Commission for the calculation of carrier regulatory fees ("Alternative One") is "based on the number of customer units, i.e., the number of users of a service, provided by the carrier as of December 31, 1994."[18] For IXCs, the number of customer units is to be determined by the nature of the service:

> For MTS provided by pre-selected interexchange carriers, the number of customer units would equal the number of presubscribed lines as described in Section 69.116 of the Commission rules. For other switched services, such as MTS, WATS, 800, 900 and operator service not billed to the number from which the call is placed, the number of customer units would equal the number of billing accounts less those already associated with presubscribed lines reported by the carrier. For non-switched services . . . the number of customer units would be based on the total capacity provided to customers measured as voice grade equivalent lines.[19]

The proposed fee under Alternative One is $.13 per customer unit.[20]

For switchless resale, the impact of Alternative One is plain and dramatic. As noted above, the lines of a switchless reseller's customers are presubscribed to the reseller's underlying carrier. Just as under the 1994 fee schedule, the underlying carrier will pay the regulatory fee for each line presubscribed to it, including the lines of the switchless resellers, and will account for those fees in the rates it

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[18] Notice at para. 59.

[19] Id.

[20] Id.

charges. Under Alternative One, however, the fees do not stop there. Since a switchless reseller has no presubscribed lines of its own, it appears that the switchless reseller will itself pay a regulatory fee based on the number of its billing accounts -- even though those billing accounts are associated with presubscribed lines already reported and paid for by its underlying carrier. The result of Alternative One is that the Commission will be paid twice and the switchless reseller will ultimately pay twice for each presubscribed line associated with a switchless reseller's billing account.

The facilities reseller will also be burdened by an excess payment of the regulatory fees pursuant to Alternative One. As explained above, the facilities reseller, with its own CIC, will pay the regulatory fee for each of its presubscribed lines, just as it did in 1994. The facilities reseller, however, must also purchase network capacity from an underlying carrier. This is most often accomplished by leasing non-switched DS0s, DS1s and DS3s from another IXC (who may, in turn, be leasing the facility from yet another IXC). Under Alternative One, the underlying carrier must calculate its number of customer units by breaking non-switched services into voice equivalent lines[21] and then pay a regulatory fee of $.13 per voice equivalent line. This increased cost will be passed on to the facilities reseller. The facilities reseller will pay a regulatory fee not only for

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[21] A DS3 equates to 672 voice equivalent lines; a DS1 to 24 and a DS0 to 1.

each of its presubscribed lines but also for each of the voice equivalent circuits it uses to serve its customers.

Contrast the double payments made by both switchless resellers and facilities resellers with the regulatory fees paid under Alternative One by an IXC that owns its network facilities. A facilities-based carrier will pay, for the most part, based on the number of its presubscribed lines and on the number of voice equivalent lines it provides. It will pay once and only once for each of these "customer units." Simply by virtue of owning its facilities, it will not be forced to pay fees built into the rates charged to it by another carrier. In an industry where margins are razor-thin, this disparity could have significant competitive consequences and could imperil the continued growth and benefits of interexchange resale.

3. Effect of Alternative Two on the Resale Market

The second method proposed by the Commission for the calculation of carrier regulatory fees ("Alternative Two") similarly threatens to impair the resale marketplace. Alternative Two is based on the "number of minutes of interstate service in calendar year 1994."[22] Under Alternative Two, minutes would be calculated as follows:

> For interstate service upon which access charges are paid, the number of minutes would equal the number of originating and terminating access minutes. For other interstate services billed based on timed usage, the number of minutes would equal the number of billed minutes. For interstate services not billed on the

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[22] Notice at para. 60.

> basis of timed usage, minutes would be estimated as the billed revenue in dollars times 10.[23]

The regulatory fee under Alternative Two would be $.08 per 1000 minutes.[24]

Under this alternative, switchless resellers, who generally do not purchase their own access, would pay a regulatory fee based on their billed minutes. The switchless resellers' underlying carriers, who do buy access, would be required to pay a regulatory fee based on the underlying carriers' access minutes which includes the minutes used by switchless resellers. For every minute sold by a switchless reseller, the Commission will collect two regulatory fees -- one from the switchless reseller and another from the underlying carrier. The burden of this double collection will fall on the switchless reseller as the underlying carrier incorporates the fee into its rates. Collecting twice for the same interexchange minute is unreasonable and excessive; it would also undermine the competitiveness of switchless resellers.

Alternative Two suffers from the same deficiency with regard to facilities resellers. Since they purchase their own access, facilities resellers would pay Alternative Two's regulatory fee based on their access minutes. However, the underlying carriers from whom they lease their facilities will also be required to pay a fee based on a per minute estimation

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[23] Id.

[24] Id.

derived from the revenue generated by the facilities leased by the reseller. Again, this alternative requires two payments for the same minutes and thus imposes a penalty on the resale carrier.

The IXC that owns its facilities will not bear the same double payment consequences. It will pay its fee based on its access minutes or its private line revenues and will not experience additional fees built into the rates of underlying carriers. As a result of the inequity in the Commission's proposed 1995 fee schedule, under either alternative, the cost of doing business for an IXC reseller will increase substantially more than the costs of an IXC that owns its own facilities.

B. The Commission's Resale Policies

The Commission has long pointed to interexchange resale as an important means of introducing competition to the telecommunications industry,[25] and has in fact prohibited discrimination against resellers in order to foster the public benefits brought by competition through resale.[26] As recently as January, 1995, the Commission has extolled the benefits of resale

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[25] See, e.g., Competitive Carrier Rulemaking, First Report & Order, 85 FCC2d 1, 29 (1980) (noting essential role of resellers in "enforc[ing] good industry practices.").

[26] See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976)(Resale and Shared Use Order)(prohibiting tariff provisions restricting resale and sharing) amended on recon., 62 FCC 2d 588 (1977) aff'd sub nom. American Telephone and Telegraph Co. v. FCC, 572 F.2d 17 (2d Cir.), cert. den. 99 S.Ct. 213 (1978).

and sharing.[27] There the Commission noted:

> [c]hief among the public benefits from unlimited resale is the incentive provided to carriers to offer services at rates that more closely reflect the underlying cost of providing service. If a carrier's communications services and facilities can be resold, it is more likely to price them closer to costs. Further, because unrestricted resale and sharing of communications services will increase the number of parties offering the same types of services, undue discrimination in the marketplace is less likely to occur.[28]

If artificially imposed external costs such as regulatory fees result in a burden on resellers that is twice as great as the burden imposed on non-resellers, resale will no longer be able to help move price toward cost because the reseller will have a higher cost structure. Further, rather than increasing the number of parties offering service, the double fee burden may force some marginal resellers to leave the market and may discourage others from entering. Given the Commission's strong policy favoring unrestricted resale and the benefits that are derived from resale, the excessive fees placed on resellers through the double billing aspect of the Commission's 1995 fee proposal is very surprising and seems quite out of character.

C. Congressional Statement of Policy Regarding Funding Mechanisms Imposed on the Common Carrier Industry

The Commission's proposed 1995 fee schedule, which, as described above, would impose a double billing of fees on resale

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[27] See Notice of Apparent Liability for Forfeiture and Order to Show Cause, In re AT&T Communications, FCC 94-359(Notice of Apparent Liability)(released January 4, 1995) at para. 12.

[28] Id. (citing Resale and Shared Use Order, 60 FCC 2d at 298-99.).

carriers, also conflicts with a statement of policy by the House Commerce Committee (then House Energy and Commerce Committee) in the Committee Report that accompanied H.R. 4522, the Federal Communications Commission Authorization Act of 1994, regarding funding mechanisms imposed on the common carrier industry. Under the heading of "Common carrier funding mechanisms," the report states:

> The Committee also wants to stress that as the Commission establishes funding mechanisms to be imposed on the common carrier industry, such mechanisms should recognize the reality of the communications marketplace, which is characterized by both facilities-based providers and resellers. <u>Any funding mechanism that imposes charges on both resellers and facilities-based providers should be rationalized so that it does not result in a "double- counting" of the fee imposed on resellers</u> . . . As the Commission develops new funding mechanisms, the Committee believes that it must pay heed to the reality of the marketplace and not result in an unfair "double-counting" on some telecommunications providers. Both resellers and facilities-based providers must contribute equitably to any industry-wide funding mechanism, and the Commission should take pains to ensure that all providers of services share the obligation to bear a fair share of the cost.[29] (emphasis added)

Although the funding mechanism used for the Telecommunications Relay Service prompted the Committee's concern, it is clear that the Committee intended its message to apply to all funding mechanisms imposed on common carriers, including the Commission's regulatory fees. The Committee recognized the value of resellers in the marketplace and wanted

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[29] <u>Report on the Federal Communications Commission Authorization Act of 1994</u>, Committee on Energy and Commerce, U.S. House of Representatives, 103rd Congress, 2nd Session, Report 103-844, October 6, 1994, at 11.

to ensure that they were not unfairly imposed upon. Since either of the Commission's 1995 fee proposals for common carriers obviously results in a double fee being borne by resellers, the Commission's proposals are clearly not in harmony with the Committee's intent.

D. The Excess Burden on Resellers Can Be Alleviated by Applying Regulatory Fees Only to Retail Interexchange Services

The Commission can avoid the harm to the interexchange resale market that may be caused by the imposition of a double regulatory fee by applying regulatory fees only to retail interexchange products and services.[30] Under this approach, interexchange products and services sold from one carrier to another for purposes of resale would be exempt from regulatory fees.[31] This would ensure that only one fee payment would be made for the same good or service and would not force resale carriers to bear more than their fair share of regulatory fees.

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[30] Some might argue that this modification should apply to local exchange access services as well since the fees that are paid by LECs are passed through to their IXC customers and therefore also create a double fee payment. However, since every interexchange service bears a relatively similar portion of the LEC regulatory fees, the pass through of those fees is competitively neutral, unlike the situation with IXC regulatory fees where the disproportionate amount borne by resellers will have serious competitive consequence. If local telecommunications resale ever becomes a reality, however, the Commission may have to take steps to ensure that local resellers are not excessively burdened.

[31] This approach is analogous to the application of state sales taxes. With state sales taxes, retail vendors are responsible for collecting the tax from consumers; to avoid more than one application of the sales tax, wholesale vendors are exempt.

LDDS strongly recommends that the Commission revise its proposed alternatives to accommodate this approach.[32]

Alternative One should be modified to read:

> For MTS provided by pre-selected interexchange carriers, the number of customer units would equal the number of presubscribed lines as described in Section 69.116 of the Commission rules, **less the number of presubscribed lines assigned to other carriers for purposes of resale**. For other switched services, such as MTS, WATS, 800, 900 and operator service not billed to the number from which the call is placed, the number of customer units would equal the number of billing accounts less those already associated with presubscribed lines reported by the carrier**, and less the number of billing accounts assigned to other carriers for the purposes of resale**. For non-switched services, . . . the number of customer units would be based on the total capacity provided to **retail** customers measured as voice grade equivalent lines.[33](recommended changes in bold and underlined)

Alternative Two should similarly be modified as follow:

> For interstate service upon which access charges are paid, the number of minutes would equal the number of originating and terminating access minutes **less the number of originating and terminating access minutes associated with services sold to other carriers for purposes of resale**. For other interstate services billed based on timed usage, the number of minutes would equal the number of billed minutes **less the number of billed minutes sold to other carriers for purposes of resale**. For interstate services not billed on the basis of timed usage, minutes would be estimated as the

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[32] It will not be difficult or administratively burdensome for IXCs to calculate their regulatory fees pursuant to LDDS' recommended modifications. All IXCs with any significant amount of wholesale business operate separate carrier sales divisions. These carrier sales divisions keep careful track of their sales to other carriers; among other things, revenue targets and sales incentives depend on close accounting of such sales. These same mechanisms can be used to exclude wholesale interexchange products and services from the calculation of regulatory fees.

[33] Notice at para. 59. In Section VI below, LDDS suggests a further refinement to the Commission's language in this paragraph to clarify an issue with regard to operator services.

<u>retail</u> billed revenue in dollars times 10.[34] (recommended changes in bold and underlined)

LDDS urges the Commission to modify its proposed 1995 fee schedule in the manner suggested to avoid impeding the continued growth of a strong interexchange resale market.

Of the two alternative fee structures for common carriers put forward by the Commission in the Notice -- the first based on a per customer unit fee and the second on a per minute fee,[35] LDDS strongly encourages the Commission to adopt the first of these alternatives, with the modifications that LDDS has set forth above and in Section VI below. Although LDDS believes that there are superior methods for determining the burden that carriers place on the Commission's resources which the Commission did not propose for apportioning regulatory fees,[36] LDDS believes that the use of customer units as the basis of fee payments is a better approximation of that burden than a usage-based fee. The Commission's ultimate goal is to protect the public interest; a customer based fee structure reflects that goal better than a minute based structure.

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34 Notice at para. 60.

35 Notice at para. 59 and 60.

36 See Section V below.

III. IN SEVERAL IMPORTANT INSTANCES, THE COMMISSION HAS NOT ADEQUATELY SUPPORTED ITS EXERCISE OF "PERMISSIVE AUTHORITY" TO REVISE THE STATUTORILY-DERIVED SCHEDULE OF REGULATORY FEES

For several discrete categories of communications services, the Commission has not adequately explained its rationale for exercising its permissive authority to revise the Schedule of Regulatory Fees. The Commission should revisit its unsupported determinations in those areas.

The fixed earth station service category offers one example where the Commission proposes to exercise its permissive authority without adequate justification. For FY 1994, the Commission was required by statute to set a fee of $6.00 per 100 operating fixed earth station antennas under 9 meters in diameter. In contrast, the statute directed the Commission to charge a fee of $85.00 per meter for earth station antennas of 9 meters or more.[37] This year, the FCC proposes that all transmit/receive antennas pay a flat fee of $185.00 per meter, and all receive-only antennas pay a flat fee of $120.00 per meter, <u>regardless of the size of the antenna</u>.[38] Thus, for a 7 meter transmit/receive antenna which last year paid 6 cents in regulatory fees, the FCC proposes that this same antenna pay $1,295.00 this year (a receive only 7 meter earth station would pay $840.00). In the case of IDB, the adverse impact is enormous: while FY 1994 fees for its fixed earth station antennas

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[37] 47 U.S.C. § 159(g).

[38] <u>Notice</u> at para. 50.

amounted to approximately $39,000, those same antennas will cost approximately $180,000 in fees under the FCC's proposed Schedule for FY 1995.

The Notice offers no rationale for the FCC's proposed enormous increase for the fixed earth station category, especially smaller antennas; at best, the Commission comments that it sought to exercise its permitted authority to "rectify this disparity" between the 1994 regulatory fees for antennas of 9 or more meters and those under 9 meters.[39] Such shorthand reasoning is not sufficient to meet Congress' directions that the Commission only make adjustments which are "reasonably related to the benefits provided to the payor,"[40] or which "reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law."[41] The Commission has not adequately explained its reasoning for exercising its permissive authority in this manner.

Moreover, the Commission appears to have attributed far too high a level of costs to the fixed earth station category. In its Notice, the FCC proposes to allocate $7.65 million in total costs to the fixed earth station category. This amount represents over 13 percent of the FCC's total cost allocation of $57 million for all Common Carrier Bureau services, and some 6.6 percent of all regulatory fees to be raised in FY 1995. In

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[39] Notice at para. 49.

[40] 47 U.S.C. § 159(b)(1)(A).

[41] 47 U.S.C. § 159(b)(3).

addition, the FCC appears to have assigned 92 Full Time Equivalent ("FTE") employees to the fixed earth station category, which does not comport in any way with the number of Commission employees actually assigned to regulate these services.

The proposed enormous increase in regulatory fees for fixed satellite earth station antennas does not reflect the cost factors established by the statute. For example, in order to get an earth station license, there is already a filing fee of $1,755 for a new transmit or transmit/receive antenna ($265 for a receive-only antenna), and a fee of $125 for modification or renewal of the license. These fees, and the processing work needed for each application, do not vary with the diameter of the antenna involved. Presumably at least part of the license fee already covers some of the administrative cost of processing a fixed earth station license application. In addition, once fixed satellite earth stations are licensed by the FCC -- a process that is routine and not staff-intensive -- the stations require virtually no regulatory oversight. Enforcement requirements, rulemaking proceedings, and user information services for fixed earth stations all are minimal and require few resources by the Commission. The minimal cost of regulating fixed earth stations stands in sharp contrast to the disproportionate amount of cost which the FCC proposes to allocate.[42]

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[42] In addition, earth station owners are also required to pay fees for the services that are transmitted from their earth stations.

The new regulatory fees will have negative public policy effects on the services in the fixed earth station category. First, they will discourage the building of infrastructure and penalize facilities-based carriers that have invested heavily, at their own risk, in expensive satellite earth stations. In addition, the "per meter" variable rate creates perverse incentives; the Commission should be encouraging the use of larger earth stations which are more spectrum efficient, use less power, and create less interference because of better antenna performance. The proposed high fees for satellite earth stations also are inappropriate because such facilities re-use the same spectrum, and thus are spectrum efficient. Thus, the Commission must revisit its fixed earth station fees category to rectify the proposed inequitable rate structure and the disproportionate cost allocation.

IV. IN PROPOSING TO EXPAND THE POOL OF FEE PAYERS, THE COMMISSION HAS COMPLETELY IGNORED A NUMBER OF ELIGIBLE SERVICE CATEGORIES

Using its permissive authority, the Commission proposes to add a significant number of service providers to the Common Carrier Service category subject to the Schedule of Regulatory Fees; these providers include telecommunications resellers, operator service providers ("OSPs"), and any other providers of WATS, 800, 900, telex, telegraph, video, or other switched access services.[43] However, as indicated previously, the statute

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[43] <u>Notice</u> at paras. 56-57.

directs the Commission to set fees which recover the costs incurred in carrying out "enforcement, policy and rulemaking, international activities, and user information services."[44] Any adjustments to the Schedule must take into account "the benefits provided to the payor of the fee by the Commission's activities,"[45] as well as "additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law."[46] Applying this statutory criteria, it is obvious that the Commission has ignored or declined to add several other service categories which have imposed, and continue to impose, regulatory costs on the Commission and which, by right, should be required to pay their fair share of FY 1995 regulatory fees.

Personal Communications Services ("PCS"), a new category of mobile radio services, was established under Part 99 of the FCC's Rules.[47] Beginning in 1994, the Commission held a series of public auctions of radio spectrum for national and regional narrowband PCS; over $1 billion in license fees were raised. As of early February 1995, over $4.5 billion in bids have been received for 99 broadband PCS licenses. In the spring of 1995, 493 broadband licenses (2 Ghz), and hundreds of other narrow and broadband licenses, will be auctioned off publicly.

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[44] 47 U.S.C. § 159(a) (1994).

[45] 47 U.S.C. § 159(b)(1)(A).

[46] 47 U.S.C. § 159(b)(3).

[47] 47 C.F.R. §§ 99.1 *et seq*.